**SONG LIAN CHYE & ORS.**

**v.**

**TAI KIAN CHEONG**

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
GEORGE SEAH FJ
MOHD. AZMI FJ
[CIVIL APPEAL NO. 110 OF 1982]
25 JUNE 1983

***CONTRACT:*** *Oral purchase agreements - Whether.for land only or for land and building - Housing Developers (Control and Licensing) Act 1966, s. 5.*

The appellants' claim was for specific performance of agreements entered into separately by each of them with the respondent for the purchase of building lots in Malacca in 1977, which lots the respondent had purchased for the purpose of a housing scheme. The appellants made certain payments to the respondent for which receipts were issued. The respondent and his partners formed a company, Syarikat Loft Sdn. Bhd., to which they assigned their rights. The company entered into a joint venture agreement with the Malacca SDC on 9 September 1977 to develop the property jointly into a housing estate. Letters were sent to the appellants reminding them that they had agreed to purchase their respective land with building at a price already agreed upon and referring them to the deposit already paid in 1977. The appellants refused to make any further payments. They sued for specific performance, claiming that the payments were for the purchase of land without building and that they were entitled to have the lands transferred to them. On the other hand, the respondent claimed the oral agreements were for the land together with buildings to be erected at a price already specified in the brochures and that the payments were part payments or deposits towards that purchase. The Judge found for the respondent. The appellants appealed raising also the point of the amendment granted to the statement of defence and that of burden of proof.

**Held:**

**[1]** There was no reason to interfere with the exercise of discretion by the Judge in granting the amendment. [*Yamaha* Motor *Co. Ltd.* v. Yamaha (Malaysia) *Sdn. Bhd. & 3 Ors.* [1983] CLJ (Rep) 428].

**[2]** The Judge did not misdirect himself on the burden of proof, when he placed the burden on the appellants to prove the nature of the 1977 oral agreements as alleged in their pleading. The existence of the agreements themselves was not in issue. It was not correct to say that the defence was *one of* confession and avoidance.

**[3]** Since evidence supporting the respondent's version of the 1977 agreements was quite overwhelming on balance it could not be displaced by mere absence of a developer's licence on the respondent's part. Though law need not be pleaded the issue of capacity must be properly pleaded. The absence of a developer's licence and lack of capacity could not constitute decisive proof of the appellants' version of the oral agreements but only affected the legality of the transaction. In any case, in view of the agreement with the SDC to develop the land there was no legal necessity for the respondent to be licensed under s. 5 Housing Developers (Control and Licensing) Act 1966.

**[4]** The receipts issued to each of the appellants were mere acknowledgement of money received and only proof to establish the oral agreements and other evidence must be considered to determine the terms and conditions of the oral agreements. The appellants were not entitled to the recovery of their deposits as they were not ready and willing to complete the purchase. [*Chow Yoong Hong v. Tai Chet Siang* [1960] MLJ 130 PC; *Linggi Plantations Ltd. v. Jagatheesan* [1972] 1 MLJ 89 at 941].

**[5]** The payments by the appellants were part payments or deposit rather than final payments. The fact that the receipts were issued in respect of part payments or deposit was consistent with the request made to the appellants for further payments towards the settlement of the agreement price.

**[6]** The appellants had not shown to the satisfattion of the Court that the printed evidence was insufficient to explain or justify the conclusions reached by the Judge. The appeal involved mainly a finding of facts and as such an appellate Court should be slow to interfere. [*Watt or Thomas v. Thomas* [1947] AC 484 at 487; *Kim Guan and Company Sendirian Berhad v. Yong Nyee Fan & Sons Sendirian Berhad* (Privy Council Appeal No. 32/1980)].

*[Appeal dismissed.]*

**Cases referred to:**
*H.G. Warren v. Tay Say Geok & Ors. [1965] 31 MLJ 44*
*Howe v. Smith [1884] 27 Ch D 89*
*Yamaha Motor Co. Ltd. v. Yamaha (Malaysia) Sdn. Bhd & Ors. [1983] CLJ (Rep) 428; [1983] 1 MLJ 213*
*Watt or Thomas v. Thomas [1947] AC 484*

**Legislation referred to:**
Housing Developers (Control and Licensing) Act 1966, s. 5

*For the appellants - A.K.J. D'Cruz; M/s. A.K.J. D'Cruz & Co.*
*For the respondents - P. Devadas & S.P. Chandra; M/s. S.F. Pang & Chandra*

## JUDGMENT

The appellants' claim was for specific performance of oral agreements entered into separately by each of them with the respondent for the purchase of building lots situated in the Mukim of Bukit Baru, Malacca in 1977. Their separate suits were consolidated by order of Court as they were based on same cause of action, same pleadings and similar documents except for the provisional lot number and the purchase price paid by each appellant. On the pleadings and the evidence, the only main issue was whether the five oral agreements were for the purchase of land only or whether they were for the purchase of land together with shophouse or semi-detached house.

The brief facts of the dispute may be summarised as follows. Sometime in 1976, the respondent with 17 others obtained contractual right to purchase 835 lots of building land which were originally, part of Lot 1127, Mukim of Bukit Baru, Malacca, from Chip Hock Realty & Development Co. Sdn. Bhd. at the price of over RM2 million for the purpose of a housing scheme. At that time sub-division of the lots had been approved by the State Government but qualified titles had not been issued. The actual agreement was, however, executed only on 14 June 1977 between Chip Hock Realty as vendor and the respondent and two others as purchasers (see Exhibit P54). The original intention was for the respondent and the syndicate to develop the land themselves, and towards this end the respondent commenced business trading as Tai Kian Cheong & Co. and invited the public to make their purchase in

the housing scheme and distributed brochures to prospective purchasers showing sketch plans of the various types of houses and shop-houses to be erected together with their sale price. A total of 825 units were offered to the public. It was between April and September, 1977 that the five appellants Song Lian Chye (PW 1), Ong Siew Chin (PW 3), Ong Sen Kheng (PW 4), Ng Chi Fan (PW 5) and Eng Yat Tong (PW 6) who were related to each other, made certain payments to the respondent for which receipts were issued. Except for Ong Siew Chin (PW 3) who paid RM3,000/- the others paid RM5,000/- each. In the meantime, due to financial problem, the respondent decided not to develop the land alone and instead he approached the Malacca State Development Corporation who agreed to participate in the housing scheme on condition that the respondent and his partners should form a limited company and assign their rights under the June 1977 agreement with Chip Hock Realty to the newly-formed company with whom the Malacca SDC would sign a joint venture agreement to develop the land. The respondent and his partners agreed and formed Syarikat Loft Sdn. Bhd. in which the respondent became the Chairman and one Tang Kwor Ham the Managing Director; and after their rights to the land had been assigned by a Deed of Assignment dated 20 July 1977, the Malacca SDC entered into a joint venture agreement with Syarikat Loft on 9 September 1977 to develop the property jointly into housing estate. Under clause 6 of the joint venture agreement (Exhibit P52) Syarikat Loft and Malacca SDC became fully responsible for the management and control of the development of the land into a housing estate, and under clauses 9 to 11 Malacca SDC undertook to finance the scheme and to arrange for housing loans for those purchasers requiring financial assistance. On 26 January 1978, Messrs S.F. Pang & Chandra, Solicitors for Malacca SDC, wrote to all purchasers including the appellants reminding them that they had agreed to purchase their respective land with building at a price already agreed i.e. shop-house RM45,000/- and semi-detached house RM35,000/- and also referred them to the deposit that they had paid in 1977. The letters were copied to Malacca SDC and Syarikat Loft Sdn. Bhd. (see Exhibit P2, D47, P21 and P31). In the said letters they informed the appellants that as construction work in the housing project would commence shortly they requested them to make a second payment towards the property varying from RM3,000/- to RM5,000/-, and they also asked them to call at their office to sign a sale and purchase agreement. As there was no response, a second letter was sent to the appellants in March, 1978 notifying them that should they fail to make the further payment as requested in the first letter, their bookings would not be confirmed and the property would be resold to other interested purchasers (see Exhibit D49, P11, P22 and P32). The second letters were also copied to the Malacca SDC and Syarikat Loft. The appellants refused to make any further payment and by their April 1978 letters the appellants claimed that the payments they had made in 1977 were for the purchase of land without building. From their evidence and submission of their Counsel, it seemed to be suggested by the appellants that as far as the lands were concerned the 1977 oral agreements were concluded and binding, but as far as the buildings to be erected on the said lands they should constitute a separate exercise, and the obligation of the respondent was only to determine the developer and it was for the appellants themselves to decide whether to accept or reject the terms and conditions of the sale and purchase agreement with the developer, and as such they were entitled to have the lands transferred into their names because they were under no obligation to make any further payment or to enter into any sale and purchase agreement. On the other hand, the respondent while admitting receipt of the various payments in 1977, maintained that the oral agreements were not for the purchase of land only but land together with shophouse or semi-detached house to be erected at a price already specified in the brochures (Exhibit P7). He also maintained that these 1977 payments did not constitute consideration for concluded contracts for the sale and purchase of bare land, but they were

part payments or deposits towards the purchase price of the whole property i.e. land with building. Under the oral agreements, it was his obligation to determine the developer with whom the appellants had to execute sale and purchase agreements for the buildings to be erected. As such the appellants were not entitled to specific performance.

On the main issue the learned trial Judge accepted the defence story and found that the 1977 oral agreements were for the purchase of building inclusive of land and not merely for land pure and simple. He held the payments made by the appellants in 1977 were deposits for the purchase of the various property as completed units. After considering and weighing all the evidence before him, the learned Judge came to the conclusion that the receipts Exhibits P1, P10, P15, P20 and P27 did not constitute final payments towards an outright purchase of the building lots but were deposits or part payments towards the purchase price of the lands with semi-detached house at RM35,000/- or with shop-house at RM45,000/- per unit. The second appellant Ong Siew Chin having paid only RM3,000/- towards the semi-detached house and the other four appellants also having paid merely RM5,000/- each towards their shop-houses, were therefore not entitled to specific performance and nor to a refund of their deposits on the authorities of *H.G. Warren v. Tay Say Geok & Ors.* [1965] 31 MLJ 44 and *Howe v. Smith* [1884] 27 Ch D 89 at p. 95. Accordingly, he dismissed the appellants' claim with costs.

Before us, various points have been raised. As regards amendment granted to the statement of Defence pertaining to the last sentence in para. 4, we do not find any reason to interfere with the exercise of discretion by the learned Judge [see *Yamaha Motor Co. Ltd. v. Yamaha (Malaysia) Sdn. Bhd. & Ors.* [1983] CLJ (Rep) 428]. With regard to burden of proof, it is not correct for the appellants to say that the Defence was one of confession and avoidance. The central issue in the dispute was the nature of the oral agreements including their terms and conditions, and not the existence of the agreements themselves. The defence never admitted in the pleading that the agreements were outright sale of mere lands with undertaking to transfer them into the respective names of the appellants when the whole site had been sub-divided into building lots and qualified titles issued by the Land Office (see paras. 2 and 5 of statement of defence). The learned Judge, therefore, did not misdirect himself on burden of proof when he placed the burden on the appellants to prove the nature of the 1977 oral agreements as alleged in their pleadings.

As regards s. 5 of Housing Developers (Control and Licensing) Act 1966, Counsel for the appellants, it seems, had not for obvious reason contended that the 1977 oral agreements were illegal, but it was alleged in evidence and submission that the respondent being an unlicensed developer at the material time did not have the capacity to enter into any agreement involving land with house although he could do so in respect of land only. Thus, on the one hand the Court was asked to ignore any illegality in the contractual transaction, whilst on the other hand they urged the Court to infer by such absence of developer's licence that the agreements must in all probabilities be in respect of land only. We are of the view that since evidence supporting the respondent's version of the 1977 agreements was quite overwhelming, on balance it could not be displaced by mere absence of developer's licence on the respondent's part. It is true that law need not be pleaded, but if the appellants had wished to bring the issue of capacity, it must be properly pleaded. The fallacy of the appellants' argument can be demonstrated in this way. For instance, merely because a money-lender had no licence under the Money Lenders Ordinance it does not necessarily follow that he could not have advanced any money to a borrower. The issue of whether money had passed from him to the borrower is a question of fact and not law. The legality of the

transaction under the Money Lenders Ordinance is, of course, a question of law. Similarly, in the present case whether the oral agreements were for sale and purchase of land only or whether they were for land with building was a question of fact, and the absence of developer's licence could only affect the legality of the transaction but it could not constitute as decisive proof of appellants' version of the oral agreements. In any event it is our view that the main stipulation in the 1977 oral agreements was for the appellants/purchasers to enter subsequently into a proper sale and purchase agreement with a developer to be determined by the respondent at the price already specified in the brochures. From the evidence respondent did keep to his bargain by forming Syarikat Loft which went into joint venture with Malacca SDC, and being a statutory body the Malacca SDC was exempted from s. 5 of the Housing Developers (Control and Licensing) Act 1966. As stated earlier it was common ground that the dispute between the parties was in respect of oral agreements entered between 29 April and 5 September 1977. It was also common ground that during that period the respondent was not a licensed developer, and although negotiation with Malacca SDC started much earlier, the joint venture agreement with the SDC through Syarikat Loft could only be executed on 9 September 1977. But in view of the said agreement with the SDC to develop the land and the nature of the oral agreements, there was, in our view, no legal necessity for the respondent to be licensed under s. 5 before he could enter into the oral agreements at the preliminary stage of the project. There was no dispute that Malacca SDC was a lawful developer under the 1966 Housing Developers Act.

As regards the receipts issued to each of the appellants, they were mere acknowledgment of money received. The appellants' claim was based on oral agreements. The receipts were mere documentary proof to establish the oral agreements. The Court must therefore determine not only from the receipts but also from other evidence what were the terms and conditions of the oral agreements. Not all the terms and conditions of the oral transaction were in the receipts. The receipts described the various payments as, "... being payment towards the purchase price of the land". They also provided the provisional lot number of each land and the date when the money was paid. Madam Ong (DW 4), wife of appellant Eng Yat *Tong* in her testimony described it as part payment or deposit; so did all the appellants. In our view, event on strict interpretation of the receipts, if the payments were in respect of outright sale of land only they should read "being payment for the land" instead of ''towards the purchase price of the land". There would have been an element of finality in the former but not the latter. The word "towards" in the context of the whole evidence was consistent with part payment or deposit rather than with final payment as was alleged by the appellants. Indeed all the appellants in their examination-in-chief referred to the payments as deposit. Even appellant Eng Yat Tong, the moving spirit behind the dispute, had said in cross-exantination that "deposit is part payment". Thus, even assuming for one moment that the 1977 oral agreement were transactions to purchase land pure and simple, it was clear from their own admission that the payments were not final payments but merely payments of depositor part payments. On this ground alone the appellants' claim for specific performance was rightly dismissed. The fact that the receipts were issued in respect of part payments or deposit is consistent with the request made for further payments in letters sent to the appellants dated 26 January 1978 (see Exhibits P2, D47, P21 and P31). These letters which were in similar terms, acknowledged the part payments made by the appellants in 1977 for which receipts had been issued. In the case of Exhibit P2, for example, which was sent to appellant Song Lian Chye, it was in the following terms:

**Re: TAMAN KERJASAMA - Provisional Lot No. 739 Mukim of Bukit Baru, Malacca with double storey shop-house to be erected thereon**

We act for Perbadanan Kemajuan Negeri Melaka (State Development Corporation Malacca)

the developers of the above housing project.

We are instructed that you have agreed to purchase the above building lot with the house to be erected thereon at the price of RM45,000.00 and have paid a sum of RM5,000.00 as deposit.

As construction work in the above housing project will commence shortly, you are now requested to call at our office **within 7 days from the date hereof** to sign the Sale & Purchase Agreement and to pay us the following:

(1) A sum of RM5,000.00 as further purchase price for the above property. Please make this payment by Cheque/Bankdraft/Cashier's Order to be made payable to us as solicitors;

(2) A sum of RM55,00 for legal cost and stamp fees for the Sale & Purchase Agreement.

The complaint of the appellants seemed to be that by letter, appellant Song Lian Chye had been asked to pay an extra RM5,000/- for a shop-house. Originally, they alleged that the agreed price was RM45,000/- (land RM5,000/- and shop-house RM40,000/-). But clearly this was not the case. The price of the whole property remained at RM45,000/- throughout. As expressly stated in the letter quoted above, the sum of RM5,000/- was requested "as further purchase price of the above property ..." It did not say that the further payment of RM5,000/- was towards the land. If the request for further payment of RM5,000/- had been settled, appellant Song Lian Chye had to pay only a balance of RM35,000/- for the shop-house inclusive of land. The case of Madam Ong (DW 4) the wife of appellant Eng Yat Tong who willingly completed the whole transaction for a semi-detached house at the price of RM35,000/- would make everything clear. It should be noted that in the brochures, Exhibit P7, the cost of the property was quoted in one lurnp sum although in the sale and purchase agreement subsequently prepared by the joint venture company the costs of land and building were apportioned in the First Schedule (see Exhibit D62). Thus, in Madam Ong's case after paying RM3,000/- as deposit or part payment in 1977 for which a receipt was issued to her in similar terms as those receipts issued to the appellants, she made a further payment of RM4,000/- on request made in Exhibit D58 which was also similar in terms to Exhibits P2, D47, P21 and P31 sent to the appellants except for theamount requested. Finally she had to pay a further sum of RM28,000/- to make up for the agreed price of RM35,000/-. The overall price of the property sold to her therefore remained at RM35,000/-.

The present appeal involves mainly finding of facts, and as such an appellate Court should be slow to interfere. As stated. by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484 at 487 and quoted with approval recently by the Privy Council in *Kim Guan and Company Sendirian Berhad v. Yong Nyee Fan & Sons Sendirian Berhad* Privy Council Appeal No. 32/1980 (still unreported):

> Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoycd by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

In this appeal the appellants have not shown to our satisfaction that the printed evidence is insufficient to explain or justify the conclusions reached by the learned Judge who had seen and heard all the witnesses and had given his reason for rejecting the evidence of the appellants and accepting the evidence of the respondent and his witnesses. We might also add that the appellants' knowledge of the true nature of the oral agreements was further demonstrated by their letters of March 1978 in reply to request for further payments (see Exhibits P3, P12, P17, P23 and P33). In these letters, whilst claiming the 1977 receipts as proof

that the oral agreements were only in respect of purchase of land, the appellants went on to say that the respondent had undertaken to erect buildings for them on the land, and they even enquired how progress payments were to be made. In our view it the oral agreements were intended to be final contract and that the appellants were entitled to have their lands transferred to their respective names, it is difficult to fathom what progress payments they were talking about and under which agreement the respondent was obliged to build for them houses on the said land? The progress payments and the respondent's obligation referred to by the appellants could only have arisen from the same oral agreements in 1977 under which the appellants had paid deposits for the whole property.

It is our view that the 1977 oral agreements were in truth and in fact preliminary agreements or booking agreements in which the respondent promised that in consideration of part payment, or deposit of RM3,000/- in the case of semi-detached house or RM5,000/- in the case of a shop-house and in consideration of the appellants undertaking to enter subsequently into a sale and purchase agreement, he would ensure the construction of such buildings at the total price of RM35,000/- and RM45,000/- respectively on the building lots provisionally specified in the receipts. The respondent having kept his bargain by getting the Malacca SDC and his own company, Syarikat Loft, to enter into joint venture agreement in erecting the buildings as promised was therefore not liable to specific performance unless it could be shown the appellants had paid the full purchase price of the property and had executed a sale and purchase agreement.

As regards appellants' request in their evidence for the return of their deposits, we, are of the view that the learned trial Judge was correct in law in holding that they were not refundable. Since the appellants were not ready and willing to complete the purchase, they were not entitled to the recovery of their deposits [see *Chow Yoong Hong v. Tai Chet Siang* [1960] MLJ 130 PC. As was stated by Lord Hailsham LC in the Privy Council case of *Linggi Plantations Ltd. v. Jagatheesan* [1971] 1 MLJ 89 at 94:

> But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

In the circumstances, we dismiss this appeal with costs.

Also found at [1983] 2 CLJ 128